

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of CLECs' Request for  
Commission Approval of ILEC Wire Center  
Impairment Analysis

ISSUE DATE: October 5, 2007

DOCKET NO. P-5692,5340,  
5643,5323,465,6422/M-06-211

In the Matter of a Commission Investigation  
Identifying Wire Centers in Which Qwest  
Corporation Must Offer High-Capacity Loop  
or Transport UNEs at Cost-Based Rates

DOCKET NO. P-999/CI-06-685

ORDER ADOPTING SETTLEMENT

**PROCEDURAL HISTORY**

On February 16, 2006, some competitive local exchange carriers (the Joint CLECs) asked the Commission to initiate a docket to determine the extent of the duty of Qwest Corporation (Qwest) to provide certain unbundled network elements (UNEs) at cost-based rates in each of its wire centers. The matter is assigned to Docket No. P-5692, 5340, 5643, 5323, 465, 6422/M-06-211, *In the Matter of CLECs' Request for Commission Approval of ILEC Wire Center Impairment Analysis*.

On May 11, 2006, the Commission opened Docket No. P-999/CI-06-685, *In the Matter of a Commission Investigation Identifying Wire Centers in Which Qwest Corporation Must Offer High-Capacity Loop or Transport UNEs at Cost-Based Rates* to investigate the extent of Qwest's duties to provide network elements in each of its wire centers throughout the state.<sup>1</sup> The Commission asked the Office of Administrative Hearings to assign an administrative law judge (ALJ) to conduct the investigation.

On June 25, 2007, the Joint CLECs<sup>2</sup> and Qwest filed a settlement with the ALJ proposing a method for resolving disputed matters in Qwest's service area in Minnesota and other states as

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<sup>1</sup> ORDER INITIATING INVESTIGATION AND NOTICE AND ORDER FOR HEARING.

<sup>2</sup> Covad Communications Company and DIECA Communications, Inc.; Eschelon Telecom, Inc.; Integra Telecom Holdings, Inc.; McLeodUSA Telecommunications Services, Inc.; Onvoy, Inc.; POPP.Com; US Link, Inc. d/b/a TDS Metrocom, Inc.; and XO Communications Services, Inc.

well. The parties filed a revised version on June 26.

On June 28, 2007, the Minnesota Department of Commerce (the Department) filed comments supporting the settlement.

On July 3, 2007, the ALJ transferred jurisdiction of the matter back to the Commission to consider the settlement.

By August 21, 2007, the Commission had received comments supporting the settlement from the Department, Onvoy, Inc., and Qwest.

This matter came before the Commission on September 13, 2007.

## **FINDINGS AND CONCLUSIONS**

### **I. Background**

The federal Telecommunications Act of 1996 (“1996 Act” or Act)<sup>3</sup> seeks to open the local telecommunications market to competition.<sup>4</sup> To this end, the 1996 Act requires each incumbent local exchange carrier (“incumbent LEC” or ILEC) to enter into an interconnection agreement with any requesting carrier (CLEC) establishing the terms under which they will connect their networks to permit each carrier’s customers to call the other’s. To facilitate competition, the Act requires ILECs to permit CLECs to use elements of the incumbent’s network. Section 251 directs ILECs to provide certain elements (“unbundled network elements” or UNEs) on just, reasonable and nondiscriminatory terms<sup>5</sup> and at cost-based rates.<sup>6</sup> In addition, § 271 directs certain ILECs to provide other elements<sup>7</sup> on just, reasonable and nondiscriminatory terms,<sup>8</sup> even if those elements do not qualify as UNEs.<sup>9</sup> The price for these elements, however, need not reflect the ILEC’s costs.

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<sup>3</sup> Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

<sup>4</sup> See conference report accompanying S. 652.

<sup>5</sup> 47 U.S.C. § 251©.

<sup>6</sup> 47 U.S.C. § 252(d)(1)(A)(i); 47 C.F.R. § 51.501 *et seq.*

<sup>7</sup> 47 U.S.C. § 271(c)(2)(B). In particular, Bell Operating Companies such as Qwest must provide access to “[l]ocal transmission from the central office to the customer’s premises...” and “[l]ocal transport from the trunk side of a wireline local exchange carrier switch....” 47 U.S.C. § 271(c)(2)(B)(iv) and (v).

<sup>8</sup> 47 U.S.C. §§ 201, 202.

<sup>9</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice

The FCC determines which elements qualify as UNEs and which do not.<sup>10</sup> To determine whether an element qualifies as a UNE the FCC must consider, among other things, whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>11</sup> The FCC concludes that an ILEC’s failure to provide an element will impair a competitor’s operations when competitors have no other economic means of acquiring the element.<sup>12</sup> ILECs may be able to make these demonstrations in areas served by some local telephone switches (“wire centers”), but not in others; consequently an element may qualify as a UNE in some areas but not others.

The FCC established specific standards for judging the adequacy of competitive alternatives for two types of elements in particular:

- Circuits carrying signals between a retail telephone customer and a local service provider’s wire center office when those circuits have the capacity to transmit signals from multiple standard phone lines simultaneously (“high-capacity loops”).
- Circuits available to carry signals between one wire center and another when such circuits would be used by only one carrier (“dedicated interoffice transport facilities”).

Whether a high-capacity loop element or a dedicated interoffice transport element qualifies as a UNE in any given wire center depends on whether economic alternative facilities exist at that location, and whether demand for telecommunications services at that location is sufficient to enable a CLEC to finance construction of its own facilities to provide the element. To facilitate this analysis, the FCC has established tests that depend solely on the number of business lines and the number of fiber-based collocators in the wire center and adjoining wire centers.<sup>13</sup>

To implement these tests, the FCC provides for parties to resolve disputes about the number of business lines and fiber-based collocators on a case-by-case basis.<sup>14</sup> But the FCC also permits

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of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) at ¶ 664, *corrected by* Errata, 18 FCC Rcd 19020 (2003) (collectively, *Triennial Review Order*), *vacated and remanded in part, affirmed in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

<sup>10</sup> 47 U.S.C. § 251(d).

<sup>11</sup> 47 U.S.C. § 251(d)(2).

<sup>12</sup> 47 C.F.R. § 51.317(b). See also *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) (*Triennial Review Remand Order*), ¶¶ 78 - 110, 149 - 166; *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>13</sup> *Triennial Review Remand Order*; 47 C.F.R. § 51.319. The terms “Business line,” “Fiber-based collocator” and “Wire center” are defined at 47 C.F.R. § 51.5.

<sup>14</sup> *Triennial Review Remand Order* at ¶ 234.

parties to negotiate different ways to address the issue.<sup>15</sup>

## **II. The Settlement**

Rather than relying on case-by-case determinations, Qwest and the Joint CLECs have now proposed a settlement, described below.

### **A. Application of FCC tests**

Applying the FCC's tests, the parties conclude that certain high-capacity loop elements and dedicated transport elements no longer qualify as UNEs in twelve wire centers. Consequently they recommend that Qwest be relieved of the duty to provide those elements at cost-based rates in those wire centers.

### **B. Conversion of former UNEs**

The parties agree that for the first three years the settlement is in effect, CLECs would pay a one-time net \$25 charge for each UNE Qwest would convert to an alternative service or product. Qwest agrees to apply this conversion fee retroactively. That is, to the extent that a CLEC has paid a higher charge to convert a UNE to some other facility as a result of the FCC's new standards, Qwest agrees to refund the difference. And under some circumstances Qwest will be willing to honor this charge when a CLEC orders a new element to replace a former UNE that was discontinued as a result of the FCC's new standards.

Parties would be free to dispute the existence and magnitude of the conversion charge that would apply after three years.

### **C. Procedures for future changes**

The settlement describes how Qwest could seek additional determinations that an element in a wire center no longer qualifies as a UNE. It details how the parties propose to define and count business lines and fiber-based collocators. And it sets forth a variety of procedural requirements, including the following:

- Qwest's rights can be affected by when Qwest files a claim for a determination. For example, if by July 1 of any year Qwest claims that an element no longer qualifies as a UNE, Qwest may rely on line count data from the prior year to support its claim.
- At least five business days before filing a claim, Qwest would need to give notice to the Joint CLECs and any other potentially affected CLEC. And at least five days before filing a claim, Qwest would ask the Commission to issue a protective order governing the handling of confidential information during the proceeding unless such procedures were otherwise already in effect.

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<sup>15</sup> *Id.* at ¶ 234, fn. 660, citing 47 U.S.C. § 252(a)(1).

- As part of its claim, Qwest would need to file certain specified types of data supporting its claim to have met the FCC's tests. Qwest would also provide the data to CLECs that are governed by the protective order.
- Once Qwest had submitted its claim and supporting data, interested persons would have 30 days to raise objections.
- Regarding elements that no party objects to reclassifying, Qwest and the Joint CLECs would ask the Commission to issue an order affirming Qwest's claim and setting the effective date (the "Effective Date for Undisputed Designations") to be the date 30 days after Qwest's initial claim had been filed. Starting 15 days after the Effective Date for Undisputed Designations, the Joint CLECs would refrain from ordering the relevant UNE.
- Regarding elements that parties object to reclassifying, Qwest and the Joint CLECs would ask the Commission to use its best efforts to resolve the dispute within 60 days of the objection. Starting 15 days after the effective date of any order supporting Qwest's claim, the Joint CLECs would refrain from ordering the relevant UNE.
- After any Commission order supporting Qwest's claim regarding the use of a dark fiber UNE, CLECs would have 180 days to stop using the UNE. After any Commission order supporting Qwest's claim regarding any other high-capacity loop UNE or dedicated transport UNE, CLECs would have 90 days to stop using the UNE. Qwest could impose a 15% surcharge for the use of the UNE during this period.

#### **D. CLEC-specific provisions**

Finally, the settlement includes language intended to become part of the interconnection agreements of each of the Joint CLECs.

### **III. Commission Action**

The Commission commends all parties for their role in producing the settlement. The FCC's proposed method of implementing its standards had the potential to result in Qwest litigating with each CLEC regarding the number of lines and collocators in each wire center each time a CLEC requested a UNE. Given the commonality of facts and interests among the parties, the parties wisely recognized the opportunity for their mutual benefit by resolving these matters in one combined, state-wide effort.

That effort has produced a workable resolution to a series of potentially contentious issues. Applying the FCC's standards in a mutually-agreeable way, CLECs have acknowledged where Qwest's duties to provide UNEs have now expired. And Qwest has acknowledged the legitimate interest of CLECs in procedural safeguards and transition periods for implementing changes in Qwest's unbundling obligations.

Based on its own analysis, on the analysis of the Department, and on the mutual assent from rival telecommunications service providers, the Commission finds that the proposed settlement serves the public interest. Consequently it will be adopted.

## **ORDER**

1. The June 26, 2007 Joint Settlement of Covad Communications Company, Eschelon Telecom, Inc., Integra Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., Onvoy, POPP Telecom, Qwest Corporation and XO Communications Services, Inc., is approved.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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